

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100

Fax: 703-872-6113

5890

9/17/2014

State of Washington Department of Ecology
ATTN: Mr. David Byers
PO Box 47611
Olympia, WA 98504-7611

Re: Claim Number 914132-

0001

Dear Mr. Byers;

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on your claim number 914132-0001. Please see the enclosed Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. If, however you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 914132-0001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Claims Manager
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 914132-0001
Claimant	: State of Washington Department of Ecology
Type of Claimant	: State
Type of Claim	: Removal Costs
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$6,881.95

FACTS:

A. Oil Spill Incident:

The Washington Department of Ecology (Ecology) reports that on December 13, 2010, Elma Fire Department asked it to investigate a metal drum that floated and came to rest in an open field near Elma RV Park. The location of the drum appears to be hydraulically connected to Cloquallum Creek, a tributary to the Chehalis River. Cloquallum Creek flows southwesterly then northeasterly around the perimeter of this drum site.

Residents reported the drum had floated on flood waters into the field in front of the RV Park. The drum was empty of contents but oil discharged from the drum had collected in several areas nearby and contaminated up to 100 square feet of soils. Samples collected from excavated soil contaminated with spillage from the drum confirmed the presence of lube oil and diesel. About five gallons of oil were released from the drum.

A Responsible Party (RP) has not been identified for this spill.

B. Description of removal actions performed:

Ecology hired Cowlitz Clean Sweep (CCS) to recover and properly dispose of oil-contaminated soil at this site.

C. The Claim: On September 9, 2014, Ecology submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$6,881.95 for the services provided on December 13, 2010. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim file.

The review of the actual cost invoicing and dailies focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), a responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of a discharge of oil, into or upon the

navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

"Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident". 33 USC § 2701(31).

Removal costs referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC 2702(b)(1)(B).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under 2714(a). 33 U.S.C. § 2713(a). If the claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. §2713(c)(2).

"Claimant" means "any person or government who presents a claim for compensation under this subchapter." 33 USC § 2701(4).

33 USC § 2712(f), which is entitled "Rights of Subrogation," provides that payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action the claimant has under any other law. 33 USC § 2715(a).

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136.203, the claimant bears the burden to prove the removal costs were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish –

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;

- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC.”

Under 33 CFR 136.205 “the amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” [Emphasis added].

DETERMINATION OF LOSS:

A. Overview:

1. FOSC Coordination has not been established. 33 CFR § 136.203(c)
2. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1).
4. A Responsible Party has not been identified. 33 U.S.C. § 2701(32).
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined whether or not the removal costs presented were for actions in accordance with the NCP and if the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable. The Claims Manager validated whether or not the costs incurred were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

First and foremost, this claim is denied because there neither notification to the NRC nor coordination regarding this incident to the proper FOSC (in this case, it would be the US EPA Region XIII) has been made. Under 33 CFR 136.203(c) and 33 CFR 136.205, this is necessary in order to establish that actions taken are deemed necessary and reasonable according to the NCP.

Ecology states that the location of the drum and spilled oil were hydraulically connected to the creek that flowed around the RV park in which it landed after being carried by flood waters. However, after analyzing the maps provided, it is unclear whether or not this amount of oil—approximately five gallons spread over an area of 100 square feet—would have reached the creek, even with the projected imminent rain. Therefore, without coordination having been established through the FOSC, the claimant has failed to demonstrate that this incident posed a substantial threat to a navigable waterway.

Based on the evidence in this submission for the actions undertaken by the Claimant, the Claims Manager hereby denies the claim submitted to the NPFC under claim #914132-0001. Should the Claimant wish to have its claim reconsidered, it would need to present its claim to the US EPA Region XIII FOSC and receive coordination that this incident was a substantial threat to a navigable waterway.

C. Determined Amount: \$0.00

Claim Supervisor

Date of Supervisor's review: 9/17/2014

Supervisor Action:

Supervisor's Comments: